



Osman & another v Nyongesa & another (Legal Representatives of Fredrick Nyongesa Wephukulu-Dcd); Kimotho (Third party) (Environment & Land Case 57 of 2016) [2024] KEELC 1068 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 57 OF 2016
EC CHERONO, J
FEBRUARY 26, 2024**

BETWEEN

ALI OSMAN 1ST PLAINTIFF

MOHAMMED OANY ISSA HUSSEIN 2ND PLAINTIFF

AND

GRACE NABWALA NYONGESA 1ST DEFENDANT

DOUGLAS JUMA WEPUKHULU 2ND DEFENDANT

LEGAL REPRESENTATIVES OF FREDRICK NYONGESA WEPHUKULU-DCD

AND

MARY NJOKI KIMOTHO THIRD PARTY

JUDGMENT

1. By way of a plaint dated 10th June,2016 the Plaintiff sought for the following orders against the Defendant;
 - a. Eviction of the defendant and demolition of structures on land parcel no. East Bukusu/south Kanduyi/4626 and mesne profits.
 - b. Costs.
 - c. Interests.
 - d. Further or other relief.
2. In the plaint, the Plaintiffs contends that they are the sole registered owners of land parcel no. East Bukusu/south Kanduyi/4626 measuring 0.26H (“herein referred to as the suit land”) having been so



registered on the 29th June, 1992. The plaintiffs aver that sometime in the year 2009, the defendant invaded the suit land and erected temporary structures therein.

3. The suit is contested by the Defendant who filed a statement of defence and counterclaim dated 2nd June, 2017 where he denied all the allegations in the plaint. It is averred that Fredrick Nyongesa Wephukulu-Dcd was the registered owner of Land parcel no. East Bukusu/south Kanduyi/4540 and that sometime in the year 1989, he caused for sub-division of the said parcel of land into three portions i.e East Bukusu/south Kanduyi/4626, 4627 & 4628. It is further averred that the defendant then sold two parcel i.e no. 4627 and 4628 each measuring 50 * 100 feet to two individuals.
4. The defendant also averred that one of the buyers namely Mary Njoki Kimotho purchased parcel no. East Bukusu/south Kanduyi/4627 then sold her portion to the plaintiffs' mother. It is the defendants' case therefore that the plaintiffs' portion of land is East Bukusu/south Kanduyi/4627 and not East Bukusu/south Kanduyi/4626 and that an error and/or mistake occurred during the sub-division and registration of the three parcels of land. The defendants case is that he has fully developed parcel NO. East Bukusu/south Kanduyi/4626 and that he has been in possession and occupation of the same all along.
5. In his counter-claim, the defendant prays for a declaratory order that he is entitled to land parcel no. East Bukusu/south Kanduyi/4626 whereas the plaintiffs are entitled to East Bukusu/south Kanduyi/4627 and an order for cancellation of the plaintiffs title or in the alternative the plaintiffs be ordered to transfer East Bukusu/south Kanduyi/4626 to the defendant's name and in default the deputy registrar do execute all necessary transfer documents and a permanent injunction restraining the plaintiffs from interfering with the defendants occupation of the same.
6. At the Close of pleadings, parties took pre-trial directions and agreed to proceed with the hearing of the case by way of viva voce evidence. The case was proceeded for hearing between 1st December, 2021 and 15th November 2023 wherein the plaintiffs called one witness while the defendant called three witnesses.

b) Evidence Of The Parties

7. PW1 Said Ali Osman adopted his witness statement dated 10th June, 2016 as his evidence in chief. He produced into evidence their amended list of documents dated 20th July, 2017 as his documentary evidence. It was his testimony that the defendant did not occupy the suit land and there were no structures therein and the same was confirmed by the District Land Surveyor Bungoma in his letter dated 2nd December, 2008. He confirmed the existence of another case Bungoma Cmcc No. 164 Of 2003.
8. In cross examination the witness stated that with his co-plaintiff they bought the land i.e 5 plots for Kshs 58,000/= in the year 1992 from Mary Njoki. It was his evidence that prior to making the purchase they physically visited the site and found that it was vacant. The sewer line had not been constructed thereon. He testified that they have not occupied the suit land because the Municipal Council constructed a sewer on it causing them to institute Bungoma Cmcc No. 164 Of 2003.
9. The witness further affirmed that they purchased the suit land and undertook all the relevant transfer procedures. It was his testimony that the allegations that their land is East Bukusu/south Kanduyi/4627 and not East Bukusu/south Kanduyi/4626 is false. In re-examination he reiterated his evidence as above and the plaintiff's case was subsequently closed.
10. Dw1 Mary Njoki Kimotho adopted her witness statement dated 21st February, 2020 as her evidence in chief. In cross examination she stated that she sold her portion of land for Kshs 70,000/= to a



lady named Sarah who was buying the land for her son. She confirmed signing the relevant transfer documents and handing them off to the purchaser to complete the transfer process. It was her evidence that she purchased a portion of land measuring 50 x 100 from Nyongesa Wepukulu (the defendant) but could not recall the land reference number of the land parcel.

11. In re-examination, the witness reiterated that she sold the land to one Sarah who was buying it for her son. She testified that she knew Sarah's son and that the plaintiffs were not Sarah's sons but the 1st plaintiff was an in-law to Sarah having married her daughter although the marriage failed. It was her evidence that a while back, the plaintiffs approached her and told her that the said Sarah had died and she should sign transfer documents for them in relation to the land which request she declined.
12. Dw2 Douglas Juma Wepukulu adopted his witness statement dated 29th November, 2021 as his evidence- in- chief. He also produced as his evidence items contained in a list of documents and a supplementary list of documents of an even date. As DExhibit 12,13,14,15 and 16. He also produced as DExhibit 1-11 being the list of documents dated 12th August,2015 as attached in the statement of defence. Further list of documents dated 10th February, 2022 was produced as DExhibit 17,18 and 19.
13. During cross-examination, the witness reiterated his testimony- in- chief and stated that an error occurred at the time of subdivision of the original parcel of land No. East Bukusu/south Kanduyi/4540 and the subsequent transfer of the resultant portions i.e East Bukusu/south Kanduyi/4626,4627 and 4628. He reiterated his testimony that the portion of land sold to Mary Njoki and which the plaintiffs now claim was measuring 50 * 100 feet while Nyongesa Wepukulu retained the larger portion.
14. In re-examination, DW2 testified that land parcel no. East Bukusu/south Kanduyi/4626 comprised of almost 5 plots which are now fully developed. He testified that Nyongesa-Wepukulu did not realize the error in the plot names until this suit was instituted.
15. Dw3 Grace Nyongesa Nabwala adopted into evidence his witness statement dated 29th November, 2021. During cross examination, the witness stated that land parcel no. East Bukusu/south Kanduyi/4626 is fully developed. The defence closed its case at this stage
16. Mary Njoki Kimotho testified as DW1 in the interested party's case where she sought to adopt her witness statement stated dated 21st February,2020 as her testimony-in-chief. Thereafter, she closed her case.

C) Submissions Of The Parties

17. The plaintiffs vide their submissions dated 19th October, 2023 submitted on three issues. First, they submitted that they were bona fide purchasers for value having purchased the suit land for a consideration and for having taken due diligence and followed all the relevant transfer procedures. They argued that the 3rd party, Mary Njoki confirmed executing all transfer documents to the suit land upon receiving the agreed consideration of Kshs. 58,000/= and as such, they were not involved in any illegality. They placed reliance in the cases of Lawrence Mukiri vs. Attorney General & 4 others(2013)eKLR ,Consolata Pande & Another vs. Ashish Bhupendra Patel & 4others (2019) eKLR, Falcon Global Logistics Co. Limited vs. Management Committee of Eldama Ravine Boarding Primary School (2018)eKLR.
18. Second, the plaintiffs contend that they have proved their case as required and the weights tilts in their favour. They argued that contrary to the allegations by the defendant that the suit land is fully developed, the same was undeveloped due to a sewer line constructed by the municipal council. They argued that the correctness of their assertions was confirmed by the letter dated 2nd December,2018 produced as PExhibit 14.



19. Third, they submitted that the defendants in their counterclaim failed to prove how they obtained the suit land illegally and unprocedurally as pleaded. They urged the court to dismiss the defendant's counterclaim with costs.
20. The defendants in their submissions dated 1st December, 2023 submitted on two issues. It was argued that from the evidence tendered in court in support of their case, the intention of the parties was such that Zakaria Nganga and Mary Njoki would acquire a portion measuring 50 * 100 feet each while Nyongesa Wphukulu would retain 0.26 Ha and that the subsequent registration was an error. They cited the cases of Manyi Kyule vs. Stephen Kalange (2021) eKLR, Kiplagat Arap Biator vs. Esther Tala Cheyegon (2016) eKLR, and John Murithi Obadiah vs. Rudia Kina Kuria (2022) eKLR.
21. Lastly, they argued that the defendants have been in occupation of the suit land since 1989 to date which is 24 years and as such, they are estopped under the provisions of Section 7 of the Statutes of Limitation Act from laying any claim over the suit land. They urged the court to dismiss the plaintiff's case with costs and allow their counter-claim.

D) Analysis And Determination

22. Upon consideration of the Plaintiff, Defence and counter-claim Witness Testimony, Exhibits and Submissions, the following are the issues that commend for determination are;
 - a. Whether the plaintiffs obtained title fraudulently.
 - b. Whether there was an error in registration of land parcel no. East Bukusu/south Kanduyi/4626.
 - c. Whether the plaintiff is entitled to the orders sought.
 - d. Who should bear the costs of the suit.
23. From the pleadings and evidence, it is clear the Plaintiffs claim the Defendant is trespasser and wish to have him evicted from the suit land while the Defendant claims that he is indeed the lawful owner of the suit land (East Bukusu/south Kanduyi/4626) whose particulars were misinterpreted during subdivision and transfer causing the same to be erroneously registered in the name of Mary Njoki and subsequently in the names of the plaintiffs.
24. For the plaintiff's case to succeed, the onus is on the plaintiff's to prove that they are the owners of the suit property and that the defendant has invaded and occupied the same without any justifiable cause. In support of their claim, the plaintiffs have produced a title deed for the suit land, a copy of an official search, a copy of green card, transfer forms, minutes of the Kanduyi LCB and a letter of consent to show how they obtained the suit land.
25. The [Land Registration Act](#) is very clear on issues of ownership of land and in particular, Section 26(1) provides as follows;

"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

Section 24 (a) of the [Land Registration Act](#) also provides as follows:

' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.....'

26. The defendant alleges that there were irregularities in the registration of the suit land and fraud on the part of the plaintiff. As mentioned above, the absolute and indefensible title of a registered owner is impeachable on the grounds of fraud. The defendant in his counterclaim alleged fraud on the part of the plaintiffs. To prove fraud, the defendant not only need to plead and particularize but also proof it by laying out water tight evidence upon which the court would make such finding. It is trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the decision of the Court of Appeal in the case of *Kuria Kiarie & 2 Others –vs- Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

27. The same procedure goes for allegations of misrepresentation and illegality. (See Order 2 Rule 4 of the Civil Procedure Rules). As regards the standard of proof, this court in the case of *Kinyanjui Kamau – vs George Kamau* [2015] eKLR expressed itself as follows;-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo –vs- Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

28. In considering the pleadings, evidence and submissions it is evident that the plaintiffs are the registered owners of the disputed land. DW1, Mary Njoki Kimotho in her testimony stated that she sold the suit property to one namely Sarah who was purchasing the land for her son. She testified that she knew the 1st plaintiff as the son- in-law of the said Sarah and not her son and that the manner in which they acquired title to the suit land was suspect. No further evidence was tendered before this honourable court in support of this position. The defendant did not call anybody from the family of the said Sarah as a witness to support these allegations.

29. Further, it was alleged that the transfer documents presented by the plaintiffs were forgeries and that the thumbprint therein did not belong to DW1. Directions were taken to have a forensic audit conducted



- to confirm this position but despite numerous court adjournments to confirm the filing of a report on this issue, nothing was ever tabled. In the circumstance therefore, the allegation that the thumbprint in the transfer documents did not belong to DW1 was not proved. Further, in the absence of any documentation from the land registrar's office that the transfer documents and the title were forgeries, this Court has no reason to find the title documents to be fraudulent.
30. This honourable court is therefore not persuaded that the plaintiffs obtained title of the suit property fraudulently. The Court shall therefore proceed on the premises that the title held by the plaintiffs is absolute and indefensible. The burden of proof therefore shifts to the defendant.
31. The plaintiffs' also claim for mesne profits in their plaint against the defendant whom they claim has encroached into their property. Section 2 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya defines mesne profits as follows: -
32. "mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;" While Order 21 Rule 13 of the Civil Procedure Rules provides as follows: -13. (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree— (a) for the possession of the property; (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits; (c) directing an inquiry as to rent or mesne profits from the institution of such suit until— (i) the delivery of possession to the decree-holder; (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or (iii) the expiration of three years from the date of the decree, whichever event first occurs. (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.
33. I note that except pleading for mesne profits, the plaintiffs did not furnish any evidence on the loss suffered, if any.
34. In the case of Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR, the Court of Appeal while dealing with a similar issue of mesne profits held as follows:
- "We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."
35. Based on the evidence placed before me and while associating myself with the legal provisions and decisions cited hereinabove, I find that the plaintiffs have failed to discharge their burden of proof to the extent that they are indeed entitled to a claim of mesne profits and I will decline to award the same.
36. The next issue to consider is whether there was an error in registration of land parcel no. East Bukusu/south Kanduyi/4626 and 4627. The defendant's case is that there was an error during sub-division of parcel no. East Bukusu/south Kanduyi/4540 and the subsequent transfer and registration of the resultant plots which saw DW1 being registered as the owner of land plot no.4626 instead of plot no. 4627.
37. The Torrens System of land registration recognizes the sanctity of title in this Country. Re- affirming the applicability of the Torrens System in Kenya in Charles Karaithe Kiarie & 2 Others –vs-



Administrators of the Estate of John Wallace Mathare & 5 Others (2013) eKLR, the Court of Appeal observed as follows: -

“The Registration of Titles Act is entirely a product of the Torrens System of registration. The word “Torrens” is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the Master Record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved.”

38. Arising from the foregoing, it was apparent that the law is alive to the possibility that an error might occur during the process of registration even under the Torrens System of land registration.
39. It is not in contention that the mother title for land parcel No. East Bukusu/south Kanduyi/4540 was subdivided into three portions measuring 0.05Ha, 0.05 Ha and 0.26 Ha i.e land parcel No. E.bukusu.kanduyi/4626, 4627 and 4628 respectively. The sub-division process was done in the year 1989 as shown in the mutation forms produced as DExhibit 19. The plaintiffs aver that they are the owners of plot no. 4626, while the defendant claims that the plaintiffs plot is actually plot no.4627 and not 4626. The defendant explained that there was an error during registration which caused a mix-up in registration of the proprietor of the two plots.
40. The defendant in support of his case called three witnesses. DW1 who testified that she acquired land measuring 50 * 100 feet (0.05ha) from the defendant and she sold it. She could not recall the plot number but she was positive on the measurement of the plot. DW2 and DW3 testified that the parcel of land sold to one Sarah was measuring 50 * 100 feet and that the remaining portion was measuring 0.26 ha which was about 5 plots. They testified that the larger portion which remained has been fully developed with shops, a church and rentals. It is this land that they claim is supposed to be Plot no. 4626.
41. The plaintiffs on the other hand claim that their plot has been unoccupied up until the year 2009 when the defendant unlawfully invaded and constructed semi-permanent structures. In support of their allegations, they produced a letter dated 2nd December,2008 as PExhibit 10. The defendant on the other hand claim that the plot has always been fully developed and produced a site position of the sewer line within E.Bukusu/S. Kanduyi 4626 and 4627 as DExhibit 4.
42. Further, the defendant produced a letter dated 17th February, 1989 from the Municipal Council of Bungoma to the Bungoma District Physical Planning Officer as DExhibit 18 which attaches the mutation form dated 28th February 1989 as DExhibit 19. The letter read;

Land Subdivision E.bukusu/s.kanduyi/4540

We submit herewith an application by Mr. Fredrick N. Wepukhulu to subdivide the above parcel and transfer the portion marked ‘B’ and ‘C’ to Mr. Zakaria N. Nganga and Mrs. Mary N. Kimotho respectively.
43. The said letter forwards a mutation form and sketch maps as mentioned above and instructs the Bungoma District PP Officer to subdivide land parcel no. East Bukusu/south Kanduyi/4540 into three



plots i.e land parcel no. 4626, 4627 and 4628 and to further register the plots marked “B” AND “C” in the names of two individuals amongst them Mary N. Kimotho. On examination of the mutation form and the sketch maps, this Court notes that the plots marked ‘B’ and ‘C’ are not indicated in either the mutation form or sketch map. This therefore means that plots ‘B’ and ‘C’ are not identifiable from the said official documents.

44. From the foregoing, this Court concurs with the defendant that it is not clear which plot was “A”, ‘B’ or ‘C’ for purposes of the proper registration as anticipated by the letter calling for the subdivision and registration of the new plots.
45. Justice Mativo on the issue of the burden of proof in *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR, quoted with approval Lord Brandon in *Rheir Shpping Co. SA. v Edmunds* [1955] IWL 948 at 955 as follows:

“No Judge likes to decide case on the burden of proof if he can legitimately avoid having to do so. There are cases, however in which owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just cause to take.”

Justice Mativo, in the above decision, went on to state as follows:

“Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the.....test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in *Britestone PTE Ltd v Smith & Associates Far East Ltd* [2007] 4SLR (R) 855 at 59: ‘The court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him.’”

46. The principle is that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of fact which he assert, must prove that those facts exist. The burden of proof in a suit or proceeding, lies on that person, who fail if no evidence at all were given on either side (See also Section 107 of the *Evidence Act*).
47. The burden of proof in this suit or proceedings therefore shift to either of the parties herein on each of the issues.
48. The standard of proof in cases is the legal standard to which a party who holds the burden of proof is required to prove his/her case. Mativo J in the above case stated that the standard of proof determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases such as the present one, the standard of proof is the balance of probabilities. Justice Mativo cited with approved Lord Denning in *Miller v Minister of Pensions* [1942] 2 ALL ER 372 where he held as follows:

“The(standard of proof).....is well settled. It must carry a reasonable degree of probability..... If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal, it is not.”

49. The evidence tendered by the defendant and his witnesses in support of the counterclaim is that the plots sold was measuring 50 * 100 feet each, leaving the larger portion to be registered in the name of the defendant. DW1 in her evidence stated that she bought from the defendant a portion of land measuring 50 * 100 Feet which was one plot and not five plots.
50. In conclusion, this Court on careful consideration of the testimonies and evidence produced is persuaded beyond peradventure that an error conceivably did occur during the sub-division of the original mother title No. E.bukusu/s.kanduyi4540 and registration of the resultant parcels No.



E.bukusu/s.kanduyi/4626 and 4627 and that such an error/irregularity forms the basis under which a title can be rectified.

51. Guided by the above principle, this court is therefore inclined to find in favour of the defendant. Ultimately, I find that the plaintiffs' portion of land is parcel No. East Bukusu/south Kanduyi/4627 while the defendant's parcel of land is No. East Bukusu/south Kanduyi/4626.
52. Ultimately, I hereby enter judgment in favour of the defendant and order as follows;
 - a. Parties shall within 30 days of this judgment cause for the cross-transfer of the titles i.e. for land parcel no. East Bukusu/south Kanduyi/4626 to the defendant and the title for land parcel no. East Bukusu/south Kanduyi/4627 to the plaintiffs. In default the Lands Registrar to dispense with the production of the original titles in respect of the two parcels and the Deputy Registrar execute all necessary transfer documents to effect the cross-transfer.
 - b. Each party shall bear their own costs.
53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF FEBRUARY, 2024.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mbugua H/B Otsiula for plaintiff
2. Omukunda H/B Masenkeli for defendant
3. Bett C/A

